

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-213311

DATE: July 24, 1984

MATTER OF: Johnson Enterprises, Inc.

DIGEST:

An agency's rejection of a firm as technically unacceptable is proper where it is based on an evaluation which is consistent with the stated evaluation criteria.

Johnson Enterprises, Inc. protests the award of a contract to Robert H. Kessler under request for proposals (RFP) No. DTOS59-83-R-00116, a total small business set-aside issued by the Department of Transportation (DOT) for preparation of an updated, revised travel manual. We deny the protest.

On September 1, 1983, a DOT procurement synopsis was published in the Commerce Business Daily (CBD) to solicit responses from firms interested in competing. These responses were not to be proposals but, rather, were intended to establish preliminarily the interested firms' capabilities to perform. The synopsis provided that the RFP would be sent to five named individuals, including Mr. Kessler, and to any other firms found qualified based on their responses to the synopsis. The synopsis set forth the following as the criteria on which ability to perform would be judged:

" . . . [I]t is important that the contractor be familiar with the Department's multiple missions and organizational arrangements as well as the relevant aspects of the Department's financial systems and personnel management practices

" . . . A response must show that you believe you have the ability to satisfactorily perform the work, have the necessary technical skills, qualified personnel, experience, and past performance in similar work. This is not a request for proposals. Your response will be considered when the request for proposals is issued"

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Four firms, including Johnson, submitted responses. All were found technically unacceptable under the above criteria, so DOT sent the RFP only to the five listed individuals. The RFP contained no evaluation criteria, but instead provided for award to the lowest offer from an offeror determined to be acceptable under the CBD synopsis criteria. Mr. Kessler was the only one of the five listed individuals to submit a proposal.

Johnson was able to obtain a copy of the RFP and did submit a "proposal" priced at \$40,000 despite having been rejected as technically unacceptable under the CBD synopsis. DOT reviewed this proposal despite its prior determination, and contacted Johnson's listed references to evaluate the working experience of the listed key personnel (Ms. Johnson). DOT concluded from these conversations that Johnson's experience in travel management was limited to the small operating level at the agency where she previously was employed. DOT thus concluded that Johnson lacked the expertise required and reaffirmed its conclusion that Johnson was technically unacceptable. It awarded the contract to Mr. Kessler on September 30 at his offered price of \$45,300.

Johnson contends that DOT rejected its CBD response based on criteria different from those advertised in the notice. It argues, for instance, that while the CBD notice stated it was "important" to be familiar with various department level operations, the evaluation referred to this familiarity as "essential," improperly making the requirement more restrictive than that in the synopsis. Johnson also believes it was improper to find its response unacceptable based on its lack of department level experience since, it maintains, such experience was not one of the advertised requirements. We disagree.

While Johnson is correct that the CBD notice labeled the familiarity criterion "important" rather than "essential," we find this to be an immaterial distinction. No matter which term is used, the notice clearly indicated that DOT required a contractor with such knowledge. While Johnson similarly is correct that the notice did not set forth a specific department level experience requirement, we again find that, reading the notice as a whole, DOT obviously wanted a firm with such experience. Quoting again from the notice, responses were to demonstrate possession of "the necessary technical skills,

qualified personnel, experience, and past performance in similar work." (Emphasis added.) The most relevant consideration here is that DOT found that Johnson lacked the departmental experience it believed was necessary to have the desired familiarity with departmental, rather than operating level, travel matters. We cannot find that rejection of Johnson's CBD response on this ground was contrary to the criteria in the notice or otherwise improper.

We do find that DOT improperly considered whether Johnson would be available to work on site, as the CBD notice made no mention of such availability. Since Johnson was properly determined technically unacceptable on other grounds, however, it was in no way prejudiced by this impropriety.

Johnson further complains that, even if the experience requirement was adequately set forth in the notice, it was improper because, of the five individuals to whom DOT sent the RFP, only Mr. Kessler possessed the experience required; the remaining four individuals had experience either at or below the level of Johnson's experience. DOT has not responded to this contention so we will assume it is correct. We agree with Johnson that DOT should not have sent the solicitation to individuals without the requisite experience while excluding Johnson for lacking this same experience. Since DOT made the award to Mr. Kessler, however, and not to one of the allegedly unqualified individuals, Johnson again was not prejudiced by DOT's action. It remains that Mr. Kessler met the experience requirement while Johnson did not.

Johnson also claims that the award here all along was intended to be made to Mr. Kessler, a former DOT employee, on a sole-source basis. We find nothing in the record to support this claim. In any event, the procurement in fact was conducted on a competitive basis. While the four individuals named in the synopsis may have been unqualified, other firms were free to vie for the award. Four firms, including Johnson, did so. The fact that they did not satisfy DOT's technical requirements, leaving Mr. Kessler as the only qualified offeror based on the criteria in the synopsis does not render the procurement sole-source.

While we conclude that Johnson's submission was fairly evaluated, we believe DOT should discontinue use of the procurement approach followed here. The procurement statutes and regulations contemplate that technical evaluations in negotiated procurements will be based on proposals submitted by all offerors in response to a request

for proposals. An approach under which only some firms must submit responses to a CBD notice to establish technical acceptability is inconsistent with the prescribed procedures. By letter of today to the Secretary, we are recommending that these procedures be adhered to in future procurements.

The protest is denied.

for Milton J. Fowler
Comptroller General
of the United States